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No. 06-224

In The
Supreme Court of the United States

DANTA DAVIS,
Petitioner,

v.

DENNIS STRAUB,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit majority correctly conclude that clearly established federal law, as determined by the Supreme Court of the United States, does not require a witness to assert the Fifth Amendment privilege against self-incrimination only by taking the stand and asserting the privilege in response to specific questions?

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The opinions and orders of the Courts that are attached to this Brief in Opposition to Petition for Writ of Certiorari are:

- Report and Recommendation of the United States Magistrate Judge, Eastern District Michigan No. 02-CV-73319-DT, issued August 14, 2003
- Order of the District Court adopting the Magistrate's Report and Recommendation and dismissing the petition, Eastern District Michigan No. 02-CV-73319-DT issued August 29, 2003
- Order of the Sixth Circuit Court of Appeals granting certificates of appealability, No. 03-2262 issued on March 11, 2004 and on March 22, 2005.

JURISDICTION

Petitioner, a state prisoner, commenced this action in the United States District Court for the Eastern District of Michigan, pursuant to 28 USC § 2254, by filing a petition for writ of habeas corpus on August 14, 2002. A magistrate judge issued a report and recommendation that the petition be denied on August 14, 2003. (Appendix page 1b) The district court issued an opinion and order that denied the petition on August 29, 2003. (Appendix page 29b) Petitioner filed a notice of appeal and motion for certificate of appealability pursuant to 28 USC § 2253. The Sixth Circuit Court of Appeals granted certificates of appealability on March 11, 2004 and on March 22, 2005. (Appendix pages 31b, 34b) On September 1, 2005, the Sixth Circuit Court of Appeals reversed, in an opinion authored by Judge Merritt. (Appendix to Petition page 47) The State filed a motion for rehearing, and on December 1, 2005 the Court issued an amended opinion affirming the District Court's denial of habeas relief. Judge Merritt filed a dissent. (Appendix to petition, page 1) Petitioner filed a motion for rehearing and suggestion for rehearing en banc,

which was denied. Five judges dissented from the denial of rehearing en banc. (Appendix to petition, page 36)

Petitioner subsequently filed a petition for a writ of certiorari in this Court. On October 4, 2006, this Court requested that Respondent file a brief in opposition to the above petition. This Court has jurisdiction to determine the issues raised in the petition pursuant to 28 USC § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 USC § 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

COUNTER STATEMENT OF FACTS

Petitioner was convicted, following a jury trial in a Michigan State court, of three counts of first degree murder for murdering Sheila Jones and her two children, seven-year-old Darquelle Ray and four-year-old Shawanna Ray; two counts of felony murder for breaking into Sheila Jones' home to murder the children; mutilating a dead body by pouring lighter fluid on Sheila Jones and lighting her dead body on fire; receiving and concealing stolen property over $100; for stealing a van to dump Sheila Jones' body; and first degree home invasion. On October 30, 1997, Petitioner was sentenced to life without parole for murder counts, 6-to-10 years imprisonment for mutilating the dead body, 3-to-5 years imprisonment for receiving and concealing stolen property, and 13-to-20 years imprisonment for the first degree home invasion.

Sheila Jones was a girlfriend of Petitioner's father. On September 26, 1996, Petitioner was living with his father, Jimmy Motley, on Dartmouth Street in Flint. Petitioner's girlfriend, Princess Wade, testified that she and her sister went to Motley's house around 7:00 p.m. on September 26 and Petitioner, his codefendant, Nathan Bell, and another man were there playing cards. Petitioner said, "Guess what? We seen Sheila with another man." He told her not to say anything. Later, the phone rang and Bell answered. Petitioner said, "Tell Jimmy that his woman's over here cheatin' on him." Ms. Wade then drove Petitioner to pick up Sheila Jones so she could talk to Motley, who was calling from jail. Jones left her home with Petitioner and Ms. Wade, telling her seven-year-old son she would b right back. Ms. Wade drove Petitioner and Sheila Jones back to Motley's house, waited outside for her sister, and then left. Dawann Brundidge testified that he and Petitioner grew up together. He was at his girlfriend's house in the evening of September 26, 1996 when Petitioner came over and asked for a ride. It was raining and Petitioner was wet. Brundidge noticed a red stain on Petitioner's shoe strings. Brundidge gave Petitioner some clothes and Petitioner changed. Brundidge threw away Petitioner's pants and

eventually gave his jacket to police. He testified that Petitioner told him he got into an argument with Sheila Jones. Brundidge took Petitioner to North Street and dropped him off.

A number of people were at Omika Simpson's house on North Street when Petitioner arrived. Riley Williams testified that Petitioner stated that, "We just killed Sheila and her kids." Williams doubted the story and said he wanted to "see the bitch." Williams took Petitioner, Chude Snow, Darrell Guster and one other person to Dartmouth Street. He testified that when they went in the garage they saw Sheila, and she was beaten, but not dead. Petitioner went into the house, got a knife and began stabbing her. Williams said at that point he left, walking to a nearby McDonald's.

Chude Snow, Nathan Bell's brother, corroborated Williams' account of Petitioner's arrival at North Street and the trip to Dartmouth. Snow testified that Petitioner told him that they beat up Sheila, that Sheila and the children were dead and Sheila was in his garage. Snow testified that Sheila was alive when they arrived and that Petitioner came in and got a couple of knives and went back to the garage. Snow also testified that Petitioner told him that Snow's brother Nathan Bell, began the beating and both men beat her. He testified that Petitioner said he had to kill the children because they knew he had come to pick up Sheila. Snow testified that Petitioner told him that he had killed Shawanna and Bell was supposed to kill Darquelle, but Petitioner had to finish the job. Snow testified that Petitioner told him that after he and Bell left, Bell "got into it with some boys," they split up and Petitioner caught a ride to North Street.

Darrell Guster corroborated the testimony of Williams and Snow regarding the trip to Dartmouth from North Street and Petitioner's admissions in the car. Guster testified that after they arrived at the Dartmouth Street house, he left with Riley Williams because he didn't want to be involved.

Ellen Stair testified that her red van was stolen sometime between 11:00 p.m. on September 26 and the morning of September 27, 1996. Dawann Brundidge testified that Petitioner returned to his house later in a van and asked to borrow a water hose. Brundidge gave him the hose, which was cut off at one end. He later went to the Dartmouth Street house with police and saw his hose laying in the yard.

Eleasha Aubrey testified that Petitioner and Nathan Bell pulled into her driveway in a reddish van. Bell had a big cut on his hand that was bleeding. Petitioner had gloves on, although it wasn't cold. The van was running, but there were no keys in the ignition, and Ms. Aubrey asked Petitioner whose van he stole. Ms. Aubrey testified that Bell had blood on his clothes and that there was a pile of blankets in the back of the van. Ms. Aubrey testified that Petitioner and Bell left and returned two hours later wearing different clothing. She testified that Bell had called her before the first visit and told her he killed somebody, and that three people were dead. She heard a man's voice in the background saying, "he just playin'."

Anthony Pickens testified that around 8:00 a.m. on the morning of September 27, 1996 he was approached by two men in a red van. One of the men was someone he had seen in the neighborhood. He later identified the men as Petitioner and Nathan Bell. They asked for a ride, offering money. They directed him to Winona Street, near Sheila Jones' home, where they encountered "police and people everywhere." Pickens testified that Petitioner and Bell were ducking and hiding in the car, and directed him to drive down side streets, not busy streets, and back to the van. They then asked Pickens to follow them, drove the van to another location, put a rag in the gas tank and lit it. He went to police after he saw the news reports of the murders.

Omika Simpson testified that she took Petitioner and Nathan Bell to Detroit on September 27, 1996. She left them in Detroit at a house where Bell's brother, Shantay Snow lived.

The bodies of seven-year-old Darquelle Ray and four-year-old Shawanna Ray were found on the morning of Friday, September 27, 1996, when their grandmother arrived to take them to school. Shawanna was lying in a big pool of blood. She had bled to death. She had defensive wounds on her hands and arms. She had 12 wounds or groups of wounds, and her throat was cut. Darquelle had 53 wounds on his face, chest, abdomen and extremities, including defensive wounds on his hands and arms. Like Shawanna, he bled to death.

On Friday evening, Petitioner called his sister, Jiquanda Davis, from Detroit. She had seen news reports of the discovery of the children's bodies. She asked Petitioner if he knew anything about it and did he know Sheila's whereabouts. Petitioner told her he had nothing to do with the children, and when asked about Sheila, he changed the subject.

Shantay Snow went to get Petitioner in Detroit when he learned that Petitioner was wanted for questioning. He testified that on the return trip Petitioner told him about the killings, and that he and Bell killed the children because they would have implicated Petitioner. This testimony was corroborated by Darrell Guster, who accompanied Snow on the trip to Detroit.

Sheila Jones' body was discovered on September 30, 1996 at Devil's Lake. It had been burned and partially devoured by animals. She had been beaten, choked, and stabbed.

Petitioner testified on his own behalf. He stated that Nathan Bell had attacked Sheila Jones when she was on the phone with his father, and that he stepped between them at one point and that he told Bell to stop another time. He testified that he left and went to Dawann Brundidge's after Bell dragged Sheila into the garage and stabbed her there. He claimed that Bell followed him at first, but then got into a confrontation with some guys on bikes, and Petitioner ran to Brundidge's house. He then testified that he asked Brundidge to take him to North Street, where Bell's brother, Chude Snow, lived. He testified that he told Bell's brother what Bell had done and that

Bell's brothers threatened him that if Bell got caught they would try to implicate Petitioner. He stated that when Bell arrived at the house he and Bell went out and stole a van, Bell put Sheila's body in the van and they took it to Devil's Lake, poured lighter fluid on it and burned it. He stated that he went with Bell because he was afraid. He denied ducking when Pickens drove he and Bell to the crime scene, admitted that some of his responses to police questioning had been untrue, and acknowledged that Nathan Bell is shorter and lighter than Petitioner. He claimed that it was not his decision to go to Detroit the day after the murders.

Following his convictions, Petitioner appealed as of right and the Michigan Court of Appeals affirmed Petitioner's convictions for murder, mutilation and receiving and concealing, and vacated the home invasion conviction. (Michigan Court of Appeals Docket No. 207725, Opinion issued 12/26/00, Apx to petition, page 71) Petitioner's Application for Leave to Appeal to the Michigan Supreme Court was denied on June 26, 2001. (Michigan Supreme Court Docket No. 118657, Order dated 6/26/01, Apx to petition, page 78)

ARGUMENT

The Sixth Circuit majority correctly concluded that clearly established federal law, as determined by the Supreme Court, does not require State courts to allow the assertion of the Fifth Amendment privilege only in response to specific questions.

In his state trial, Petitioner intended to call Demaris Jourdan as a witness for the defense. After consultation with an attorney Jourdan asserted his Fifth Amendment right and declined to testify. The Michigan appellate courts affirmed Petitioner's convictions, upholding the trial court's decision allowing Jourdan to refuse to testify.

The district court and the Sixth Circuit majority determined that the State court's decision was neither contrary to nor an unreasonable application of this Court's precedents as outlined in *Williams v Taylor.*[1]

Petitioner claims that the Sixth Circuit's view of "clearly established Federal law, as determined by the Supreme Court of the United States," under 28 USC § 2254(d)(1) is not in accord with the decisions of this Court because it is too restrictive.

The petition states at p. 20:

> . . . the principles that a witness has no Fifth Amendment privilege unless there is a real and probable, not imaginary and unsubstantial, danger of self-incrimination, and that the privilege must be invoked in response to questions and not in a blanket fashion, are clearly established.

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[1] *Williams v Taylor,* 529 US 367, 409-411 (2000).

Petitioner claims that the Sixth Circuit majority found the above principles "virtually inapplicable" to habeas cases because this Court has not adopted them in a "case with indistinguishable facts." (Petition, p. 20) By aggregating *two* principles Petitioner unnecessarily confuses the issue. The first principle, that the invocation of the Fifth Amendment privilege must be based on a real danger of self-incrimination, has indeed been clearly established by this Court.[2] It is a general rule that must be applied on a case-by-case basis to varying factual circumstances. In most circumstances, this rule would be considered, in a case involving federal habeas review of a state conviction, under the "unreasonable application" prong of § 2254(d)(1).[3]

The second principle, that a witness asserting the Fifth Amendment privilege must, in all cases, take the stand and respond on a question-by-question basis, has not been clearly established by this Court. This second rule is a "bright line" rule which, in most cases, would be reviewed under AEDPA's "contrary to" prong.

Petitioner's claim is that the Michigan courts are bound by clearly established United States Supreme Court law to require a witness asserting the self incrimination protection to take the stand and invoke the Fifth Amendment privilege in response to questions. Petitioner seeks a bright line rule, and the Sixth Circuit majority properly affirmed the District court's denial of habeas corpus relief and concluded that this Court has not adopted such a rule, and that the State courts are therefore not bound to adopt it either.

This Court has cautioned that it is the holdings, as opposed to the dicta, of the Court's cases that clearly establish rules that must be followed by the State Courts.[4] Petitioner cites

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[2] *Hoffman v United States*, 341 US 479, 486 (1951).
[3] *Yarborough v Alvarado*, 541 US 652, 664 (2004).
[4] *Yarborough v Alvarado*, 541 US 652, 660-661 (2004).

Hoffman v United States,[5] apparently because this Court there referred to the applicability of the privilege to "answers" that might incriminate the witness. But in *Hoffman*, the witness appeared before a Grand Jury and did, in fact, invoke the privilege in response to certain questions. Whether a question-by-question procedure is mandated by the Constitution was therefore not at issue, and certainly not the holding of the Court, as the Sixth Circuit majority found.

While a number of the Federal circuits, including the Sixth, follow a rule requiring a question-by-question invocation of the privilege, the courts of the State of Michigan are not obliged to adopt such a rule absent a holding by this Court that this procedure is required by the Constitution.

It is a separate question whether the State court's conclusion that Jourdan was entitled to assert the privilege, under the circumstances of the case, was a reasonable application of this Court's Fifth Amendment holdings. Petitioner claims that Jourdan was not entitled to claim the privilege because he was merely present at the scene of the crime and had previously given a statement to police. The District Court adopted the magistrate's report, which considered these arguments:

> Petitioner also contends that Jourdan did not have a reasonable fear of incriminating himself, and thus that the trial court erred in determining that he could invoke the privilege. However, a trial judge is accorded broad discretion in determining whether the privilege is properly invoked, and a reviewing court, even on direct review, must accord substantial deference to the trial court's determination. *See United States v. Gibbs*, 182 F.3d 408, 431 (CA 6, 1999); *United States v. Gaitan-Acevedo*, 148 F.3d 577, 588 (CA 6, 1998). Petitioner has failed to show that the trial court's exercise of its

[5] *Hoffman v United States*, 341 US 479, 486-487 (1951).

broad discretion was unreasonable, and thus he is not entitled to habeas relief on this claim.

As Petitioner correctly notes, a witness's fear of prosecution must be real and reasonable; it cannot be merely fanciful or speculative. *See Ohio v. Reiner*, 532 U.S. 17, 21 (2001); *Gaitan-Acevedo*, 148 F.3d at 588. Nevertheless, the privilege against self-incrimination must "be accorded liberal construction in favor of the right it was intended to secure." *Hoffman*, 341 U.S. at 486. Thus, it is only when the danger of incrimination is no more than fanciful that a court should overrule a witness's claim of privilege. *See Resnover v. Pearson*, 965 F.2d 1453, 1462 (7th Cir. 1992). Here, Jourdan did have a reasonable fear of incrimination which was more than fanciful and speculative. It was clear that Jourdan was present at the scene of the crime, and there was some evidence that Jourdan's involvement went beyond mere presence. The prosecutor stated that he and the police believed that Jourdan was involved, and were continuing to gather evidence to bring charges against him. In these circumstances, Jourdan has a real and reasonable fear that his answers might be incriminating. *See Resmover*, 965 F.2d at 1462.

Petitioner argues that Jourdan did not have a reasonable basis to fear incrimination because Jourdan denied any involvement in the crimes. However, the Supreme Court has held that a witness may invoke the privilege even where he denies involvement in the crime, where the answers, particularly to cross-examination questions, may expose the witness to the possibility of incrimination. *See Reiner*, 532 U.S. at 21. Further, it does not matter that Jourdan's answers may not have provided evidence against him that would convict him. "[T]he privilege not only extends 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the

claimant.'" *Reiner*, 532 U.S. at 20 (quoting *Hoffman*, 341 U.S. at 486) (alteration in original).

> Finally, contrary to petitioner's argument, Jourdan did not waive the privilege through his previous statements to the police. The Supreme Court has held that a defendant may invoke the privilege after a guilty plea but prior to sentencing because the act of incrimination is "not complete" until the conviction and sentence is final. *See Mitchell v. United States*, 526 U.S. 314, 325-27 (1999); see also, *United States v. Boothe*, 335 F.3d 522, 527, 2003 WL21523661, at *4 (CA 6, 2003) ("[A] guilty plea is not a blanket waiver of the privilege against self-incrimination and it survives through sentencing."). If a defendant's incriminating statements under oath at a plea colloquy do not abrogate the privilege, mere statements to police officers likewise do not abrogate the privilege. [R 34; Magistrate's Report and Recommendation, pp 16-18, Apx 45]

Witness Jourdan's presence at the scene of the horrific murder of Sheila Jones could clearly have provided a link in a chain of evidence that could have incriminated Jourdan. Several witnesses testified that Petitioner had told them that Jourdan also stabbed Jones, and Nathan Bell claimed, in a statement to police, that Jourdan was the first to stab the victim. Thus, Jourdan's invocation of the privilege was not based on:

> "a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct."[6]

The Sixth Circuit majority correctly concluded that the decisions of this Court do not require a State court to allow the assertion of the Fifth Amendment privilege against self-

[6] *Brown v Walker*, 161 US 591, 608 (1896).

incrimination only on a question-by-question basis. This Court should deny certiorari.

In addition, the concern of the dissenting judges in the Sixth Circuit that Petitioner is probably innocent is not supported by a careful reading of the record. Petitioner states that "Jourdan was the only other person at the scene besides Davis and Bell." (Petition, pp 5-6) This is inaccurate. Sheila Jones was brutally beaten and left in the garage at Dartmouth Street. Jourdan told police that Bell was Jones' assailant, and Jourdan also told police that she was still alive when he left the scene. Numerous witnesses testified that Petitioner boasted about the murder, and when Riley Williams stated he wanted to "see the bitch," Petitioner and four others, not including Bell or Jourdan, returned to Dartmouth Street only to find Jones still living. Four witnesses testified that Petitioner went into the house and returned with knives to complete the murder. Two witnesses stated that they saw him stab her. Petitioner claimed that all of these witnesses were biased because two were Bell's brothers and two were friends of the brothers. All of these allegedly biased witnesses, however, testified that Petitioner told them that he and Bell had beaten Sheila Jones and murdered her children, and that Demaris Jourdan had stabbed Sheila also. Riley Williams testified that he referred to Petitioner's father as "Uncle Jimmy." Moreover, Petitioner's claim that he helped dispose of Jones' body out of fear of Bell is questionable in view of the fact that, after the two became separated, he caught a ride to the home of Bell's brothers. Petitioner also admitted that he is taller and heavier than Bell.

Finally, Demaris Jourdan had no first hand knowledge at all regarding the murders of the two little children. In a document that Petitioner claims is a private investigator's interview, Jourdan purportedly states that Bell said he would have to kill the children and sought Jourdan's assistance. The document is undated, unsigned and was never admitted as evidence in the State court or in the Federal District Court. It was merely attached to pleadings in the State courts and included as an attachment to the habeas petition.

In short, Demaris Jourdan was not present when Sheila Jones was finally stabbed to death. He was not present when seven-year-old Darquelle and four-year-old Shawanna were slashed to death. At best, Jourdan might have testified that Nathan Bell administered the initial beating of Jones. This testimony would not "strongly tend to exonerate" Petitioner, nor is it even inconsistent with the testimony of the other witnesses. The concerns of the Sixth Circuit dissenting judges that Jourdan's testimony would have shown that Petitioner is an innocent man are not well founded.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

DANTA DAVIS,
Petitioner,

v.

DENNIS STRAUB,
Respondent.

CASE NO. 02-CV-73319-DT
JUDGE GERALD E. ROSEN
MAGISTRATE JUDGE PAUL J. KOMIVES

REPORT AND RECOMMENDATION

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I. RECOMMENDATION: The Court should deny petitioner's application for the writ of habeas corpus.

II. REPORT

A. *Procedural History*

1. Petitioner Danta Davis is a state prisoner, currently confined at the G. Robert Cotton Correctional Facility in Jackson, Michigan.

2. Petitioner was tried in the Genesee County Circuit Court on charges arising from the deaths of Sheila Jones and her two children, Darquelle and Shawanna Ray. On September 19, 1996, following a jury trial, petitioner was convicted of three counts of first degree premeditated murder, MICH. COMP. LAWS § 750.316(1)(a) (for the deaths of Jones, Darquelle, and Shawanna); two counts of first degree felony murder, MICH. COMP. LAWS § 750.316(1)(b) (for the deaths of Darquel and Shawanna); one count of first degree home invasion, MICH. COMP. LAWS § 750.110a(2); one count of disinterment and mutilation of a body, MICH. COMP. LAWS § 750.160; and one count of receiving or concealing stolen property, MICH. COMP. LAWS § 750.535. On October 30, 1997, petitioner was sentenced to concurrent terms of life imprisonment on each of the six murder convictions, 6-10 years' imprisonment for the mutilation of a body conviction, and 3-5 years' imprisonment for the receiving stolen property conviction. He was also sentenced to a consecutive term of 13-20 years' imprisonment on the home Invasion conviction.

3. Petitioner appealed as of right to the Michigan Court of Appeals raising, through counsel, the following claims:

I. THE PROSECUTOR IMPROPERLY INTIMIDATED A CRUCIAL DEFENSE WITNESS INTO INVOKING HIS PRIVILEGES AGAINST SELF-INCRIMINATION, IN VIOLATION OF DEFENDANT'S RIGHTS TO DUE PROCESS, COMPULSORY PROCESS, AND TO PRESENT A DEFENSE.

II. DEFENDANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE MICHIGAN AND UNITED STATES CONSTITUTIONS WHERE DEFENSE COUNSEL FAILED TO MOVE THE ADMISSION OF CRUCIAL, UNAVAILABLE WITNESS'S STATEMENTS AS HEARSAY EXCEPTIONS.

III. BECAUSE THE PROSECUTOR INTIMIDATED JORDAN INTO ASSERTING HIS PRIVILEGES AGAINST SELF-INCRIMINATION, THE FAILURE TO GRANT JORDAN IMMUNITY IN THE CIRCUMSTANCES OF THIS CASE DEPRIVED DEFENDANT OF HIS RIGHTS TO A FAIR TRIAL, COMPULSORY PROCESS, AND TO PRESENT A DEFENSE UNDER THE MICHIGAN AND UNITED STATES CONSTITUTIONS.

IV. DEFENDANT WAS DENIED A FAIR TRIAL AND HIS RIGHT TO PRESENT A DEFENSE UNDER THE MICHIGAN AND UNITED STATES CONSTITUTIONS WHERE THE TRIAL COURT SUSTAINED THE BLANKET, UNFOUNDED ASSERTION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION BY A CRUCIAL DEFENSE WITNESS.

V. THE TRIAL COURT ERRED IN SENTENCING DEFENDANT ON TWO COUNTS OF FELONY MURDER IN ADDITION TO THE UNDERLYING FELONY OF HOME INVASION IN VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY.

VI. THE TRIAL COURT ERRED IN CONVICTING AND SENTENCING DEFENDANT FOR TWO COUNTS OF FELONY MURDER AND TWO COUNTS OF PREMEDITATED MURDER IN VIOLATION OF THE PROHIBITION AGAINST DOUBLE JEOPARDY.

The court of appeals found no merit to petitioner's first four claims, and affirmed his convictions and sentences on these bases. See *People v. Davis*, No. 207725, 2000 WL 33385391 (Mich Ct. App. Dec. 26, 2000) (per curiam). The court of appeals granted relief on the double jeopardy claims, vacating the home invasion conviction and directing that the judgment be amended to reflect, with respect to the deaths of Darquelle and Shawanna, that petitioner was convicted of one count of first degree murder for each death, under two separate theories. See *Id.* at *3, slip op. at 4.

4. Petitioner sought leave to appeal the four issues upon which he did not obtain relief to the Michigan Supreme Court. The Supreme Court denied petitioner's application for leave to appeal in a standard order. See *People v Davis*, 464 Mich. 872, 630 N.W. 621 (2001).

5. Petitioner, through counsel, filed the Instant application for a writ of habeas corpus on August 14, 2002. As grounds for the writ of habeas corpus, he raises the four claims upon which he was not granted relief in the state courts. Petitioner filed a brief in support of his habeas application on March 17, 2003.

6. Respondent filed his answer on April 16, 2003. He contends that petitioner's claims are without merit.

B. *State Court Proceedings Regarding the Testimony of Dermaris Jordan*

Petitioner was charged and convicted in connection with the deaths of Sheila Jones and her two children, Darquelle and Shawanna Ray. He was tried in a joint trial, before separate juries, with his co-defendant, Nathan Bell. The prosecution's theory at trial was that Bell and petitioner killed the victims together. A number of witnesses, most with some relationship with Bell, testified to petitioner's involvement in the murders. Petitioner testified in his own defense, asserting that he had nothing to do with the murders, and only helped Bell dispose of Jones's body out of fear.

1. *Trial Proceedings Relating to Jordan's Testimony*

Petitioner's habeas claims focus on the absence of testimony from Demaris Jordan,[1] an eyewitness whom he claims would have corroborated his testimony at trial. After defense counsel called Jordan as a witness, the prosecutor requested a sidebar conference with the court. After the sidebar, the judge excused the jury. See Trial Tr., dated 9/17/97, at 26-27. The judge then had the prosecutor relate what had been said at the sidebar conference. The prosecutor stated: "Your Honor, the next witness is a suspect in these crimes. And we would request that the Court advise him of his Constitutional rights before he testifies so that he is completely aware of the implications of his testimony." *Id.* at 27. Defense counsel responded that, based on the evidence, he did not think that Jordan was a suspect, and that he had discussed the matter with Jordan and did not believe that Jordan would incriminate

[1] The trial transcript spells his name as "Jourdan." For consistency, I use the "Jordan" spelling, as that is the spelling used by the Michigan Court of Appeals.

himself. See *id.* at 28. The following exchange then occurred between the trial judge and Jordan:

THE COURT:	All right. Mr. Jourdan, you understand that there have been statements attributed to various individuals involved in this case that implicate you in this offense? You understand that?
THE WITNESS:	Yes.
THE COURT:	Do you understand that you have the absolute right not to testify if your testimony will, in any way, incriminate you? Do you understand that?
THE WITNESS:	No, sir.
THE COURT:	You do not understand that?
THE WITNESS:	No, sir.
THE COURT:	Do you understand that you cannot be forced to testify in a case where your testimony could lead to charges being brought against you for this crime? Do you understand that?
THE WITNESS:	Yes.
THE COURT:	Have you, at any time since this case occurred, had the benefit of discussing your situation with an attorney?
THE WITNESS:	Repeat that again?
THE COURT:	Have you discussed your situation in this case with an attorney at any time since last September?
THE WITNESS:	Have I talked to an attorney?
THE COURT:	Yeah, your attorney, an attorney for you?
THE WITNESS:	No, sir.

Id. at 28-29. Based on Jordan's responses, the trial court adjourned so that counsel could be appointed to advise Jordan regarding his decision to testify. When the court reconvened, Michael Manley, the attorney appointed to represent Jordan,

indicated that Jordan wished to invoke his privilege against self-incrimination:

> Your Honor, my client is sixteen years of age, so I had the opportunity to meet with him, as well as his mother, who is present and before the Court, Miss Ladonna, Jourdan, and his step-father, Mr. Randy Freeman.
>
> Mr. Beauvais [defense counsel] was kind enough to allow me to review all the statements allegedly made by my client, Mr. Jourdan. And I also had the opportunity to speak to the Court to get some background information as to the calling of Mr. Jourdan as a witness in the presence of Mr. Busch [the prosecutor] and Mr. Beauvais in the Court's Chambers.
>
> So I did have some background information in talking to Mr. Jourdan. I had the opportunity to read the statements that Mr. Jourdan made. I had the opportunity to speak to his parents, because he is a minor, and get their opinion and at this time my client would elect to exercise his Fifth Amendment rights and chooses not to testify in this matter.

Id. at 30-31.

Defense counsel responded that, in his opinion, there was nothing in the record which would incriminate Jordan were he to testify. He also noted that in the year between the crime and the trial, the prosecutor had not charged Jordan with any crime. Counsel continued:

> I think what is happening today is that this young man is afraid that if he takes the stand and testifies truthfully and that truthful testimony will help Danta Davis that, in fact, the Prosecutor will then, as retribution for him testifying, will then charge him with a crime.

> I believe the only reason that this was brought forward at this particular time was to keep this young man from testifying. And I believe that because of that my client is being denied his right to a fair trial and is denied his right to have witnesses appear, witnesses that can certainly exonerate this person.

Id. at 32-33. The prosecutor responded that he had an obligation to insure that Jordan's rights were protected, and that he was not trying to intimidate the witness. *See id* at 33-34. After allowing rebuttal from defense counsel, the court held:

> With respect to his testimony, that being Mr. Jourdan's, there's really two issues here, and there may be more.
>
> But first of all, whether or not he testifies is a choice that is his alone under these circumstances. There has been testimony [in] this trial which, if believed, could implicate Mr. Jourdan in the events surrounding the death of Sheila Jones and/or the aftermath of those events.
>
> I don't know what Mr. Jourdan would testify to if he did testify. But the fact of the matter is he has a constitutional right not to testify if he believes that this testimony may in any way incriminate him.
>
> Whether he has talked to Mr. Beauvais or whether he has talked to the Prosecutor's Office, he's not talked to someone representing his interest until this morning.
>
> The interests of Mr. Davis aren't necessarily the interests of Demaris Jourdan. And certainly the interests of the Prosecutor's Office may not be the interests of Mr. Jourdan.
>
> He's been given the opportunity to consult with an attorney who represents his interest. On the advice of his attorney he has decided not to testify. As far as I am concerned that issue is not open to attack.
>
> The second issue is a procedural aspect of what occurred here this morning. And Mr. Jourdan was

> called as a witness, he was sworn to tell the truth in front of this jury, and now this jury will be brought back into this courtroom, Mr. Jourdan will not be here, and they will not hear his testimony.
>
> I will instruct the jury when they come back in that they are not to draw any inference one way or another from Mr. Jourdan's non-appearance; and they are not to speculate in any way regarding Mr. Jourdan's non-appearance. We will then proceed and you will call your next witness to testify.

Id. at 36-37.

2. *Motion for New Trial Proceedings*

Following his conviction, petitioner filed a motion for new trial raising this issue. The court conducted an evidentiary hearing on the motion, at which both the prosecutor and defense counsel testified. Arthur Busch, the prosecutor, testified that as the case was being investigated, the police advised him and his staff that they believed that Jourdan was at a minimum present at the time of Jones's murder, and may have been involved in her stabbing. The police believed that he had at least been involved in cleaning up the crime scene, See Mot. Tr., dated ½2/22/99, at 6-7. At the time charges were filed against petitioner and Bell, the prosecutor believed that he did not have enough evidence to charge Jordan, but thought the police might be able to "piece together" a case against Jordan. They attempted to build such a case even after the trial had concluded. See Id at 7-8. After he became aware that defense counsel might call Jordan as a witness, he told counsel that somebody would have to get a lawyer for Jordan so that he could be made aware of his rights. See *Id.* at 10-11.

Philip Beauvals, petitioner's counsel at trial, also testified at the hearing. He stated that he had read Jordan's two statements to the police, and that in his opinion nothing in those statements tended to incriminate Jordan. *See id.* at 31-32. He denied that he had any discussions with the prosecutor

regarding Jordan's testimony or the need for Jordan to obtain legal advice concerning his rights. *See id.* at 33-36. He was never told by the police or prosecutors, nor did he get the impression, that Jordan was a suspect in the murders. *See id* at 38-39.

After hearing argument from both sides, the trial judge denied petitioner's motion for a new trial. The court explicitly found that defense counsel "knew or should have known—with emphasis on the should have known—that Mr. Jordan required some treatment outside the presence of the jury before he was called to the stand." *Id.* at 84. This conclusion was based on counsel's own testimony that he (a) knew that Jordan had been named as a participant by Bell; (b) knew that one witness indicated that Jordan had told her that he had helped clean up the scene; and (c) would have advised Jordan against testifying had he been Jordan's counsel *See id.* at 84. Turning to the legal issues involved, the court concluded that there was nothing improper in Jordan's assertion of the privilege against self-incrimination, noting that Bell had stated in his statement to the police that Jordan had stabbed Jones. *See id.* at 85-86. The court further concluded that, in light of how the issue came up and the fact that Mr. Beauvais should have known that the issue would arise, the prosecutor did not intimidate Jordan into exercising his Fifth Amendment rights. Rather, "the statements by the prosecutor constituted a truthful warning," "[n]o threat was made," and "it was a well qualified attorney independent of the Prosecutor's Office, who advised Mr. Jordan and made the decision accordingly." *Id.* at 87. Finally, the court concluded that petitioner did not have any right to demand that Jordan be granted immunity, because this argument presupposed that Jordan was, in fact, coerced into invoking his Fifth Amendment rights by the prosecutor. *See id* at 87-88.

3. *Appeal*

On appeal, petitioner raised the four claims, including the three specifically related to Jordan's testimony, that he raises here. The Michigan Court of Appeals concluded that petitioner

was not entitled to relief on any of these claims. With respect to the propriety of Jordan's invocation of his right to remain silent, the court of appeals noted that "the trial court improperly stated that Jordan had a constitutional right not to testify if he believed that his testimony would be self-incriminating," rather than if he had an objectively reasonable basis to fear self-incrimination. *Davis*, 2000 WL 33385391, at *3, slip op. at 3. Nevertheless, the court of appeals also noted that "the trial court also found that there was a reasonable basis for Jordan to fear self-incrimination, especially during questioning on cross-examination, and the record amply supports this determination." *Id.* The court of appeals also rejected petitioner's intimidation claim, reasoning that the prosecutor did no more than inform the trial court that Jordan was a suspect and should be advised of his rights. *See id.* at *2, slip op. at 2.3. Finally, the court of appeals concluded that "the prosecutor had no duty to grant immunity to witness Jordan Id. at *3, slip op. at 3.

The court of appeals also rejected petitioner's claim that counsel was ineffective for failing to seek admission of Jordan's pretrial statements under MICH. R. EVID. 804(b)(3), (6). The court concluded that Jordan's statements did not come within the hearsay exceptions contained in Rule 804(b), and thus that counsel was not ineffective for failing to seek admission of the statements. *See id.* at *3, slip op. at 3.

C. *Standard of Review*

Because petitioner's application was filed after April 24, 1996, his petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). See *Lindh v. Murphy*, 521 U.S. 320,326-27 (1997). Amongst other amendments, the AEDPA amended the substantive standards for granting habeas relief by providing:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment

> of a State court shall not be granted with respect to any claim that was adjudicated on the merits In State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 USC § 2254(d).

The Supreme Court recently explained the operation of § 2254(d)(1). In *Williams v Taylor*, 529 US 362 (2000), the Court explained that "the 'contrary to' and 'unreasonable application' clauses [have] independent meaning." *Id.* at 405.[2] With respect to the "contrary to" clause, the Court explained that a state court decision will be contrary to clearly established law in two situations. First, "a state court decision will certainly be contrary to . . . clearly established precedent if the state applies a rule that contradicts the governing law set forth in [the Court's] cases." *Id.* Second, "a state-court decision will also be contrary to [the] Court's clearly established precedent if that state court confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a result different from [the Court's]

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[2] The following discussion comes from Part II of Justice O'Connor's opinion in Williams. Although Justice Stevens wrote the opinion for the Court in several other respects, Part II of his opinion, in which he discusses the standard of review under § 2254(d)(1), was joined only by three other Justices (Justices Souter, Ginsberg, and Breyer), Part II of Justice O'Connor's opinion, also discussing the standard of review, was joined by four other Justices (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas). Thus, Justice O'Connor's opinion constitutes the opinion of the Court with respect to the standard of review under the AEDPA (except for one footnote, citing to legislative history, in which Justice Scalia did not join).

precedent." *Id.* at 406. "On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from [the Court's] cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id.* Such a case is therefore governed by the "unreasonable application" language of § 2254(d)(1).

With respect to the "unreasonable application" language, the Court provided somewhat less guidance. The Court did reject the subjective "not debatable among reasonable jurists" standard that had been adopted by a number of Courts of Appeals. *See id.* at 409-10. And the Court clarified that "an unreasonable application of federal law is different from an Incorrect application of federal law," *Id* at 410. Beyond that however, the Court simply noted that "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable," *Id.* at 409, and explained that "[t]he term 'unreasonable' is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Id.* at 410; *cf. Jacobellis v Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J.) (noting that "obscenity" is hard to define "[b]ut I know it when I see it.").

By its terms, § 2254(d)(1) limits a federal habeas court's review to a determination of whether the state court's decision comports with "clearly established federal law as determined by the Supreme Court." Thus, "§ 2254(d)(1) restricts the source of clearly established law to [the Supreme] Court's jurisprudence." *Williams*, 529 U.S. at 412.[3] Further, the "phrase

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[3] This does not mean, however that the decisions of lower federal courts are entirely irrelevant. First of all, this Court is bound by pertinent decisions of the United States Court of Appeals for the Sixth Circuit. *See Timmreck v. United States*, 577 F.2d 372, 374 n.6 (6th Cir. 1978), *rev'd on other grounds*, 441 U.S. 780 (1979); *Conrad v. Rofin-Sinar, Inc.*, 762 F.Supp. 167, 172 (E.D. Mich. 1978). Thus, to the extent that the Sixth Circuit has held that certain Supreme Court cases "clearly establish" federal law in certain respects, this Court is bound by those determinations, regardless of

refers to the holdings, as opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." *Id.* However, the Supreme Court need not have decided a factually identical case for the law to be "clearly established;" rather, the law is clearly established to the extent that the relevant Supreme Court precedent fairly can be said to require a particular result or a particular mode of analysis given the facts and legal claims involved in the petitioner's case, regardless of whether the Supreme Court has decided the precise issue presented. *See Id.* at 391 (internal quotation and citation omitted) (that a particular test "of necessity requires a case-by-case examination of the evidence obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by [the] Court.").[4]

D. *Claims Relating to Jordan's Testimony (Claims I, III, & IV)*

Petitioner first raises three claims relating to Jordan's invocation of his Fifth Amendment privilege against self-incrimination. Specifically, petitioner claims that the privilege was not properly invoked, the prosecutor intimidated Jordan into invoking the privilege, and Jordan should have been granted immunity by the trial court or prosecutor. The Court should conclude that petitioner is not entitled to habeas relief on these claims.

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whether this Court would interpret the Supreme Court precedent differently. Further, although the federal court is limited to Supreme Court precedent in determining whether a particular right is clearly established "[t]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." *O'Brien v. DuBois*, 145 F.3d 16, 25 (1st Cir. 1998).

[4] This language is from Part III of Justice Stevens' opinion, which was joined by a majority of the Court.

1. *Clearly Established Law Generally*

"A defendant's right of confrontation and compulsory process under the Sixth Amendment is not violated when a witness invokes her right against self incrimination under the Fifth Amendment." *United States v Dago*, 813 F. Supp. 736,746 (D. Colo. 1992), *aff'd* 33 F.3d 63 (10th Cir. 1994) (Table). "The Sixth Amendment right of an accused to compulsory process to secure attendance of a witness does not include the right to compel the witness to waive his Fifth Amendment privilege." *United States v Trejo-Zambano*, 582 F.2d 460, 464 (9th Cir. 1978). Thus, "the courts have generally agreed that 'the Sixth Amendment's right of compulsory process must give way to the subpoenaed witness' personal Fifth Amendment right against self-incrimination.'" *Royal v Maryland*, 529 F.2d 1280, 1283 (4th Cir. 1976) (dissenting op.) (quoting *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974); see also, *United States v Hernandez*, 962 F.2d 1152, 1161(5th Cir. 1992); *United States v Paris*, 827 F.2d 395, 399 (9th Cir. 1987); *United States v George*, 778 F.2d 556, 563 (10th Cir. 1985); *United States v Alexander*, 735 F. Supp. 923, 927 (D. Minn. 1990).

In addition, the trial judge is afforded broad discretion in determining the merits of a claim of privilege. *Hernanadez*, 962 F.2d at 1161. Further, "a district court certainly has the discretion to ensure that a witness in danger of unwittingly incriminating himself is aware of his constitutional privilege." *United States v Valdez*, 16 F.3d 1324, 1331 (2d Cir. 1994); *see also, United States v Smith*, 997 F.2d 674,680 (10th Cir. 1993); *United States v Arthur*, 949 F.2d 211,215-16 (6th Cir. 1991); *United States v Silverstein*, 732 F.2d 1338, 1345 (7th Cir. 1984); *United States v Colyer*, 571 F2d 941,946(5th Cir. 1978); *United States v Morrison*, 535 F.2d 223, 228 (3d Cir. 1976). Of course, the trial judge must be careful in exercising this discretion that he is not unduly suggestive or intimidating, thereby coercing a witness into invoking the privilege. *Valdez*, 16 F.3d at 1331; *Arthur*, 949 F.2d at 215; *see also, Webb v. Texas*, 409 U.S. 95, 97-98 (1972) (per curiam).

2. *Jordan's Assertion of His Fifth Amendment Privilege (Claim IV)*

Petitioner claims that Jordan's assertion of his Fifth Amendment privilege was not proper, and that therefore the trial court erred in accepting the privilege and allowing Jordan to avoid testifying. Specifically, petitioner contends that the trial court (a) applied the wrong legal standard; (b) improperly concluded that Jordan faced a reasonable probability of prosecution; and (c) did not fully inquire into Jordan's assertion of the privilege. The Court should conclude that petitioner is not entitled to habeas relief on this claim.

a. *Legal Standard Applied by the Trial Court*

Petitioner first contends that the trial court applied an incorrect legal standard to Jordan's assertion of the privilege, because the trial court stated that Jordan "has a constitutional right not to testify if he believes this testimony may in any way incriminate him." Trial Tr., dated 9/17/97, at 36. Petitioner is correct that this is an inaccurate statement of the law; the merits of a claim of privilege are to be determined by the trial court under an objective standard, not by the witness's own subjective beliefs. See *Hoffman v United States*, 341 (U.S. 479,486(1951). Despite the trial judge's statement, however, it is clear that he evaluated the merits of Jordan's claim of privilege, and did not merely rely on Jordan's subjective belief. Specifically, the trial judge concluded that "[t]here has been testimony [in] this trial which, if believed, could implicate Mr. Jourdan in the events surrounding the death of Sheila Jones and/or the aftermath of those events." Trial Tr., dated 9/17/97, at 36. The judge reiterated this conclusion at the hearing on petitioner's motion for new trial. *See Mot. Tr.*, dated ½2/98, at 85-86. Thus, as the Michigan Court of Appeals noted, "while the trial court improperly stated that Jordan had a constitutional right not to testify if he believed that his testimony would be self-incriminating, the trial court also found that there was a reasonable basis for Jordan to fear self-incrimination[.] *Davis*,

2000 WL 33385391, at *3 sup op. at 3[5]

b. *Jordan's Fear of Prosecution*

Petitioner also contends that Jordan did not have a reasonable fear of incriminating himself, and thus that the trial court erred in determining that he could invoke the privilege. However, a trial judge is accorded broad discretion in determining whether the privilege is properly invoked, and a reviewing court, even on direct review, must accord substantial deference to the trial court's determination. *See United States v. Gibbs*, 182 F 408, 431 (6th Cir. 1999); *United States v Gaitan-Acevedo*, 148 F.3d 577,588 (6th Cir. 1998). Petitioner has failed to show that the trial court's exercise of its broad discretion was unreasonable, and thus he is not entitled to habeas relief on this claim.

As petitioner correctly notes, a witness's fear of prosecution must be real and reasonable; it cannot be merely fanciful or speculative. See *Ohio v. Reiner*, 532 U.S. 17, 21 (2001); *Gaitan-Acevedo*, 148 F3d at 588. Nevertheless, the privilege against self-incrimination must "be accorded liberal construction in favor of the right it was intended to secure." *Hoffman*, 341 U.S. at 486. Thus, it is only when the danger of incrimination is no more than fanciful that a court should overrule a witness's claim of privilege. See *Resnover v. Pearson*, 965 F.2d 1453, 1462 (7th Cir. 1992). Here, Jordan did have a reasonable fear of incrimination which was more than fanciful and speculative. It was clear that Jordan was present at

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[5] Even if the trial court applied the wrong legal standard, such that its analysis was "contrary to" clearly established federal law, this alone would not entitle petitioner to habeas relief. Rather, the question would then be whether the state court's ultimate determination was the equivalent of an unreasonable application of the correct legal standard. *See Millender v Adams*, 187 F. Supp. 2d 852, 864 n.3 (E.D. Mich. 2002) (Rosen, J.). Because, as explained below, petitioner has failed to establish a constitutional violation under the correct standard, petitioner is not entitled to relief on this basis even if the trial court did, in fact, apply the incorrect standard.

the scene of the crime, and there was some evidence that Jordan's involvement went beyond mere presence. The prosecutor stated that he and the police believed that Jordan was involved, and were continuing to gather evidence to bring charges against him. In these circumstances, Jordan has a real and reasonable fear that his answers might be incriminating. *See Resnover*, 965 F.2d at 1462.

Petitioner argues that Jordan did not have a reasonable basis to fear incrimination because Jordan denied any involvement in the crimes. However, the Supreme Court has held that a witness may invoke the privilege even where he denies involvement in the crime, where the answers, particularly to cross-examination questions, may expose the witness to the possibility of incrimination. *See Reiner*, 532 U.S. at 21. Further, it does not matter that Jordan's answers may not have provided evidence against him that would convict him. "[T]he privilege not only extends 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant." *Reiner*, 532 U.S. at 20 (quoting *Hoffman*, 341 U.S. at 486)(alteration in original).

Finally, contrary to petitioner's argument, Jordan did not waive the privilege through his previous statements to the police. The Supreme Court has held that a defendant may invoke the privilege after a guilty plea but prior to sentencing because the act of incrimination is "not complete" until the conviction and sentence is final. *See Mitchell v. United States*, 526 U.S. 314, 325-27 (1999); *see also, United States v. Boothe*, ___ F.3d ___, ___, 2003 WL 21523661, at *4 (6th Cir. July 8, 2003) ("[A] guilty plea is not a blanket waiver of the privilege against self-incrimination and it survives through sentencing."). If a defendant's incriminating statements under oath at a plea colloquy do not abrogate the privilege, mere statements to police officers likewise do not abrogate the privilege.[6]

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[6] Contrary to petitioner's argument, there is nothing inconsistent between this conclusion and the conclusion that Jordan's statements to the police

Accordingly, the Court should conclude that petitioner is not entitled to relief on this basis.

c. *Blanket Assertion of the Privilege*

Petitioner finally contends that the trial court erred by permitting Jordan to make a blanket assertion of the privilege without having to invoke the privilege as to specific questions. The Court should conclude that petitioner is not entitled to habeas relief on this ground.

Petitioner is correct that, as a general rule, a witness may not make a blanket invocation of the privilege and must invoke it in response to specific questions. Nevertheless, the trial court's acceptance of a blanket privilege does not require relief where it is clear that the particularized inquiry would be futile. *See Gibbs*, 182 F.3d at 431. Thus, a trial court may sustain a blanket claim of privilege where the court, based on its familiarity with the evidence in the case, concludes that the witness could properly invoke the privilege to answer all legitimate, relevant questions put to him. *See United States v Klinger*, 128 F.3d 705, 709-10 (9th Cir. 1997); *United States v Ortiz*, 82 F.3d 1066, 1073 (D.C. Cir. 1996). Here, Jordan could legitimately fear incrimination from answering any questions put to him. Even his admission that he was present during the murder, although undisputed arid not sufficient in itself to convict him of any crime, would be one link in the chain of evidence establishing his guilt. Thus, petitioner cannot show that the trial court's acceptance of Jordan's blanket assertion of the privilege was unreasonable. *See Klinger*, 128 F at 710. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

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were not statements against Jordan's penal interest admissible under Rule 804(b)(3). The mere fact that the prior statements did not contain incriminating information (i.e., information against Jordan's penal interest) does not compel the conclusion that such information would not have been revealed had Jordan testified. *See United States ex rel. Sanchez v Gilmore*, No. 96 C 3956, 1998 WL 325261, at *3 (N.D. Ill. June 11, 1998); *State v. Jacob*, 866 P.2d 507, 508-09 (Or. Ct. App. 1994).

3. *Prosecutorial Intimidation (Claim I)*

Petitioner next claims that he was denied his constitutional rights because, regardless of the merits of Jordan's claim of privilege, the prosecutor coerced Jordan into exercising the privilege. The Court should conclude that petitioner is not entitled to habeas relief on this claim.

"Warnings concerning the dangers of [testifying] can be emphasized to the point that they compel a witness, by threat or intimidation, not to testify or to invoke the Fifth Amendment," thus implicating a defendant's constitutional right to present a defense. *United States v Blanche*, 149 F.3d 763, 768 (8th Cir. 1998) (citing *Webb*, 409 U.S. at 97-98); *see also, United States v Pierce*, 62 F.3d 818, 832 (6th Cir. 1995). Although *Webb* itself dealt with coercive warnings by the trial judge, "the conduct of prosecutors, like the conduct of judges, is unquestionably governed by *Webb*." *United States v Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998). However, not every warning of the dangers to the witness of testifying is improper; indeed, it is often prudent for a prosecutor or the court to advise an unrepresented witness about the dangers of testifying. *See Vavages*, 151 F at 1189; *Pierce*, 62 F.3d at 832. Thus, "[w]here the prosecutor simply provides the witness with a truthful warning, no constitutional violation occurs." *United States v. Jackson*, 935 F.2d 832, 847 (7th Cir. 1991); *see also, Pierce*, 62 F.3d at 832. A court's or prosecutor's warning is coercive only where the substance of the warning is "a threat over and above what the record indicates was timely, necessary, and appropriate." *Jackson*, 935 F.2d at 847 (internal quotation omitted). In short, "[a] defendant's constitutional rights are implicated only where the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially Interfere with a defense witness' decision to testify." *Vavages*, 151 F.3d at 1189.

In this case, the prosecutor's statement warning Jordan of the dangers of testifying was "closer to a truthful warning that

to the 'highly intimidating' statements, 'excessive in number and badgering in tone or phrasing,' and 'obviously threatening,' that past cases have identified as so coercive as to raise constitutional concerns." *Jackson*, 935 F.2d at 847. There is no indication that, despite petitioner's contrary conclusory allegation, the prosecution's view of Jordan as a suspect was illegitimate. Rather, the prosecutor testified without contradiction at the hearing on petitioner's motion for new trial that Jordan had been considered a suspect from the outset. Thus, the prosecution's investigation of Jordan predated his being called as a witness and was not prompted by the prospect of Jordan's testimony. *See United States v. Whittington*, 783 F.2d 1210, 1219 (5th Cir. 1986). Further, the prosecutor did not even warn Jordan directly. Rather, he merely informed the court, in Jordan's presence, that Jordan remained a suspect. The court then asked Jordan whether he understood his rights, and when it appeared that Jordan did not completely understand his rights, the court appointed counsel for him. It was counsel, and not the prosecutor or the court, who advised Jordan to invoke his privilege against self-incrimination. In light of these facts, there was no improper prosecutorial or judicial coercion which "preclude[d] (Jordan) from making a free and voluntary choice whether or not to testify." *Webb*, 409 U.S. at 98; *see United States v Santiago-Becerrill*, 130 F.3d 11, 25-26 (1st Cir. 1997); *Jackson*, 935 F.2d at 847; *United States v Simmons*, 699 F.2d 1250, 1251-52 (D.C. Cir. 1983). Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

4. *Failure to Grant Immunity (Claim III)*

Finally, petitioner contends that he was denied his right to a fair trial by the prosecutor's or court's failure to grant Jordan immunity. The Court should conclude that petitioner is not entitled to habeas relief on this claim.

As a general rule, separation of powers principles prevent a court from either granting immunity to a witness or ordering the prosecution to do so. *See United States v. Pennell*, 737 F.2d

521, 527 (6th Cir. 1984). The Michigan courts apply these same principles. *See People v. Schmidt*, 183 Mich. App. 817, 827-32, 455 N.W.2d 435-36 (1990). Thus, petitioner can point to no clearly established Supreme Court precedent in support of his claim. On the contrary, in federal cases the Supreme Court has unequivocally held that '[n]o court has authority to immunize a witness," *Pillsbury Co. v Conboy*, 459 U.S. 248, 261 (1983), and the Sixth Circuit has "consistently held that a district court is without authority to either grant immunity to a witness who asserts his Fifth Amendment privilege against self incrimination or to force the government to do so." *United States v Talley*, 164 F.3d 989, 997 (6th Cir. 1999).

It is true that some courts have recognized two possible exceptions to this rule in circumstances where the actions of the prosecutor would amount to a violation of the criminal defendant's due process rights to a fair trial. Even assuming that these exceptions constitute "clearly established federal law" sufficient to support a habeas claim, they are inapplicable here.

As the Ninth Circuit has explained, "the prosecutor's refusal to grant use immunity to a defense witness denies the defendant a fair trial only when (1) the witness's testimony would have been relevant, and (2) the prosecution refused to grant the witness use immunity with the deliberate intention of distorting the fact-finding process." *Williams v. Woodford*, 306 F.3d 665, 697-98 (9th Cir. 2002). The misconduct prong can be satisfied in one of two ways, by showing that the prosecution either (a) "intentionally caused a defense witness to invoke the privilege against self-incrimination," or (b) "granted immunity to a government witness in order to obtain that witness's testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness." *Id.* at 698; *see also, United States v Emuegbunam*, 268 F.3d 377, 401 & n.5 (6th Cir. 2001).

Here, petitioner cannot show prosecutorial misconduct under either standard. As explained above, petitioner has failed

to establish that the prosecution intentionally caused Jordan to invoke his privilege against self-incrimination. Similarly, there is nothing in the record to indicate, and petitioner does not argue, that the prosecution granted immunity to its own witnesses and not to Jordan in order to deliberately distort the fact-finding process. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

E. *Ineffective Assistance of Counsel (Claim II)*

Petitioner next claims that counsel was ineffective for failing to seek the introduction of Jordan's pretrial statements to the police and prosecutors. In these statements, Jordan indicated that petitioner's involvement was limited to cleaning up some blood, and that petitioner never hit or stabbed Jones. *See Petr's Br., Exs.* 3 & 4. The Michigan Court of Appeals rejected petitioner's ineffective assistance claim, concluding that the statements would not have been admissible under MICH. R. EVID. 804(b). The Court should conclude that petitioner is not entitled to habeas relief on this claim.

1. *Clearly Established Law*

The Sixth Amendment right to counsel and the corollary right to effective assistance of counsel protect the fundamental right to a fair trial, *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish the ineffective assistance of counsel, petitioner must show that: (1) counsel's errors were so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment;" and (2) counsel's deficient performance prejudiced the defense. See Id. at 687. These two components are mixed questions of law and fact. *See id.* at 698. Further, "[t]here is no reason for a court deciding an ineffective assistance claim to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. If "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.*

With respect to the performance prong of the *Strickland* test, a strong presumption exists that counsel's behavior lies within the wide range of reasonable professional assistance. *See Id.* at 689; *O'Hara v. Wigginton*, 24 F.3d 823, 828 (6th Cir. 1994). "[Petitioner] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. With respect to the prejudice prong of the *Strickland* test, the ultimate inquiry is "whether there is a reasonable probability that, absent [counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

2. *Analysis*

Petitioner contends that trial counsel was ineffective for failing to seek the introduction of Jordan's statements under Rule 804(b). Specifically, petitioner contends that counsel should have sought introduction of the statement (a) as a statement against penal interest under Rule 804(b)(3), (b) based on the "clean hands" principle of Rule 804(b)(6),[7] or (c) under the residual hearsay exception codified in Rule 804(b)(7). The Court should conclude that petitioner is not entitled to relief on these claims.

As noted above, the Michigan Court of Appeals determined that Jordan's statements were not admissible under Rule 804(b). This Court cannot interfere with the state court's interpretation of state evidentiary law. "A determination of the

[7] At the time of petitioner's trial, this rule was not codified in Rule 804(b). Effective September 1, 2001, this "clean hands" rule was codified at Rule 804(b)(6), and the existing catch all provision was renumbered as paragraph (b)(7). Petitioner contends that this was still a basis upon which to seek introduction of the evidence, inasmuch as Rule 804(b)(6) reflects merely a codification of existing law, and not a new evidentiary rule.

admissibility of . . . evidence is not within the purview of [a] court in conducting habeas review." *Johnson v. Karnes*, 198 F.3d 589, 593 n. 3 (6th Cir. 1999) (discussing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)). Thus, this Court is bound by the Michigan Court of Appeals's determination that the evidence was inadmissible under state law in resolving petitioner's ineffective assistance of counsel claim. *See Maynard v. Lockhart*, 981 F.2d 981, 986 (8th Cir. 1992) (habeas court bound by state court's admissibility determination in deciding whether counsel was ineffective for failing to object). Because the evidence was inadmissible under state law, counsel cannot be deemed ineffective for failing to seek its introduction. *See Anderson v Goeke*, 44 F.3d 675, 680 (8th Cir. 1995); *Burnett v Collins*, 982 F.2d 922, 929 (5th Cir. 1993).

Further, even were this Court permitted to examine the state court's evidentiary rulings, petitioner has not shown that the Michigan Court of Appeals's determination was unreasonable. For example, Jordan's statements were not admissible as a statement against interest under Rule 804(b)(3). This rule allows the admission, where the declarant is unavailable as a witness, of "[a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Mich. R. EVID. 804(b)(3). However, Jordan's statements are not self-inculpatory, and thus do not come within the rule. Jordan describes no involvement of his own in the crimes, stating only that he was present at the scene. There is nothing in the statements which inculpates Jordan in a "real and tangible" way. Thus, the statements are not admissible under Rule 804(b)(3). *See People v. Barrera*, 451 Mich. 261, 271-72, 547 N.W.2d 280,287 (1996).[8]

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[8] Interpreting the identically worded Federal Rule of Evidence 804(b)(3), the United States Supreme Court has held that the rule does not permit

Nor were Jordan's statements admissible under Rule 804(b)(6). This rule permits the introduction of "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." MICH. R. EVID. 804(b)(6). Even assuming that the rule, which was adopted after petitioner's trial, is applicable here, Jordan's statements are not admissible under the rule. The sine qua non of this rule is that the party against whom the statement is offered engage in some "wrongdoing" which causes the unavailability. *See United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002). Here, as explained above, the prosecutor did not engage in any "wrongdoing." Rather, he merely brought to the court's attention the need for Jordan to be advised of his rights. Jordan himself determined, after consulting with counsel, to invoke his Fifth Amendment privilege. Thus, the prosecutor did not procure Jordan's unavailability by any wrongdoing. *See United States v. Dolah*, 245 F.3d 98, 103-04 (2d Cir. 2001).[9]

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introduction of statements which are not truly self-inculpatory, even if those statements are part of a broader self-inculpatory narrative. *See Williamson v. United States*, 512 U.S. 594,600-01(1994). Under this rule, none of the statements by Jordan exculpating petitioner are self-inculpatory, and thus they do not come within the Rule 804(b)(3) exception. *See United States v. Vegas*, 27 F.3d 773, 782 (2d Cir. 1994). However, the Michigan courts have, as of yet, not adopted the Williamson interpretation with respect to Michigan Rule of Evidence 804(b)(3). *See People v. Beasley*, 239 Mich. App. 548, 556, 609 N.W.2d 581, 584 (2000); *cf. People v Beasley*, 462 Mich. 906, 612 N.W.2d 161, 162 (2000) (Cavanagh, J., dissenting from denial of leave to appeal arguing that the court should grant leave to consider adopting the *Williamson* interpretation of Rule 804(b)(3)).

[9] I have found no Michigan cases addressing Rule 803(b)(6). In this situation, the Michigan courts find persuasive federal court cases interpreting similar federal evidentiary rules. See People v. Meredith, 459 Mich. 62, 70 n. 15, 586 N.W.2d 538, 541 n. 15 (1998); People v. Vandervliet, 444 Mich. 52, 60 n.7, 508 N.W.2d 114, 119 n.7 (1993), amended on other grounds, 445 Mich. 1205, 520 N.W.2d 338 (1994); People V. Finley, 161 Mich. App. 1, 8 n.2, 410 N.W.2d 282, 287 n.2 (1987), aff'd, 431 Mich. 506, 431 N.W.2d 19 (1988).

Finally, petitioner cannot show that the evidence was admissible under the residual "catch-all" exception contained in Rule 804(b)(7). This rule permits admission of a statement of an unavailable witness which does not come within Rule 804(b)(1)-(6) if the statement bears similar circumstantial indicia of reliability. See MICH. R. EVID. 804(b)(7). Here, Jordan's statement bore no such indicia. The statements were given after the event, and were neither contemporaneous with events nor a spontaneous utterance or narrative. Rather, they were given to police as part of formal interviews, in response to specific questions. In these circumstances, the Michigan courts have routinely concluded that the statements are not admissible under Rule 804(b)(7). *See People v. Foster*, No. 229440, 2002 WL 1375730, at *5 (Mich. Ct. App. June 25, 2002) (per curiam); *People v. Dorchy*, No. 217665, 2001 WL 1134733, at *3 (Mich. Ct. App. Sept. 18, 2001) (per curiam).

In short, petitioner cannot show a reasonable probability that, but for counsel's inaction, the statements of Jordan would have been admitted. He therefore cannot show that the Michigan Supreme Court's rejection of his ineffective assistance of counsel claim was unreasonable. Accordingly, the Court should conclude that petitioner is not entitled to habeas relief on this claim.

F. *Conclusion*

In view of the foregoing, the Court should conclude that the Michigan Court of Appeals's resolution of petitioner's claims did not result in a decision which was contrary to, or which involved an unreasonable application of, clearly established federal law. Accordingly, the Court should deny petitioner's application for the writ of habeas corpus.

III. NOTICE TO PARTIES REGARDING OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within

ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72. 1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *See Willis v. Secretary of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991). *Smith v. Detroit Federation of Teachers Local* 231, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

Dated: 14 AUG 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DANTA DAVIS

Petitioner

No. 02-CV-73319-DT
Hon. Gerald E. Rosen

v.

DENNIS STRAUB,

Defendant

Filed
Aug 29 2003
Clerks Office

_____/

ORDER ADOPTING MAGISTRATES JUDGE'S COURT REPORT AND RECOMMENDATION AND DISMISSING PLAINTIFF'S HABEAS CORPUS ACTION

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on 29 AUG 2003

PRESENT: Honorable Gerald E. Rosen
United States District Judge

This matter having come before the Court on the August 14, 2003 Report and Recommendation of United States Magistrate Judge Paul J. Komives recommending that the Court deny Plaintiff's petition for a writ of habeas corpus and that this case, accordingly, be dismissed; and no timely objections to the Magistrate Judge's Report and Recommendation having been filed; and the Court having reviewed the Magistrate Judge's Report and Recommendation and the Court's file of this action and having concluded that for the reasons stated in the Report and Recommendation, Plaintiff's petition for habeas corpus

relief should be denied; and the Court being otherwise fully advised in the premises.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation of August 14, 2003 be, and hereby is, adopted by this Court.

IT IS FURTHER ORDERED that, for the reasons set forth in the Magistrate Judge's Report and Recommendation, Plaintiff's petition for habeas corpus relief be, and hereby is DENIED and the above-captioned case, therefore, is DISMISSED.

IT IS FURTHER ORDERED that for the reasons stated in the Report and Recommendation, the Court concludes that Petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, the Court declines to issue a certificate of appealability or grant leave to proceed on appeal *in forma pauperis*. *See* Fed. R. App. Pro. 24(a).

/s/
Gerald E. Rosen
United States District Judge

FILED
MAR 11, 2005
LEONARD GREEN, Clerk

No. 03-2262

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Danta Davis,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	
	)	ORDER
Dennis Straub, Warden,	)	
	)	
Defendant-Appellee	)	
	)	

Danta Davis, a Michigan prisoner, applies for a certificate of appealability (COA) in his appeal of a district court order and judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254.

A jury convicted Davis of first degree murder (3 counts), felony murder (2 counts), mutilation of a body, receiving or concealing stolen property, and home invasion. He was sentenced on October 30, 1997, to three concurrent terms of life in prison without parole for the murder convictions, in addition to 6-10 years for mutilation of a body, 3-5 years for receiving stolen property, and 13-20 years for home invasion. On January 22, 1999, the state trial court denied Davis's motion for a new trial following an evidentiary hearing. The Michigan Court of Appeals affirmed Davis's conviction and sentence, with one exception; the appellate court remanded the case with instructions to vacate Davis's conviction and sentence for home invasion. See *People v. Davis*, No. 207725,

2000 WL 33385391 (Mich. Ct. App. Dec. 26, 2000). On June 26, 2001, the Michigan Supreme Court denied leave to appeal.

In his § 2254 petition, Davis presented four grounds for relief: (I) The prosecutor improperly intimidated a crucial defense witness into invoking his privileges against self-incrimination, in violation of defendant's rights to due process, compulsory process, and to present a defense; (II) Defendant was deprived of his right to the effective assistance of counsel where defense counsel failed to move the admission of a crucial, unavailable defense witness's statements as hearsay exceptions; (III) Because the prosecutor intimidated a crucial defense witness into asserting his privileges against self-incrimination, the failure to grant the witness immunity in the circumstances of this case deprived defendant of his rights to a fair trial, compulsory process, and to present a defense; and (IV) Defendant was denied a fair trial and his right to present a defense where the trial court sustained the blanket, unfounded assertion of the privilege against self-incrimination by a crucial defense witness.

In a report filed on August 14, 2003, a magistrate judge recommended that Davis's petition be denied. The district court, noting that no timely objections had been filed, adopted the magistrate judge's report and recommendations and dismissed Davis's § 2254 petition in an order and judgment filed on August 29 and entered on September 4, 2003. The same day the judgment was entered, Davis's objections were filed. These were followed by a motion for reconsideration, which the district court denied in an opinion and order entered on September 18, 2003, after consideration of the objections.

An individual seeking a certificate of appealability is required to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2); *cf. Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The Supreme Court recently held that "petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could

conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); see also *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Upon consideration, the court concludes that, as to the grounds for relief numbered I through III, Davis's application does not meet the above standard for the reasons stated by the district court.

However, it is submitted that reasonable jurists could debate whether Davis's constitutional rights were implicated by Jordan's blanket invocation of his Fifth Amendment privilege before any questions were asked of him.

Accordingly, Davis's application for a COA is granted only as to issue IV: whether Davis was denied a fair trial and his right to present a defense where the trial court sustained the blanket assertion of the privilege against self-incrimination by a crucial defense witness. The Clerk's Office shall issue a briefing schedule as to that issue only. A COA is denied as to issues I through III.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

FILED
MAR 22, 2005
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 03-2262

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Danta Davis,	)	
	)	
Petitioner-Appellant	)	
	)	
v.	)	
	)	ORDER
Dennis Straub, Warden,	)	
	)	
Defendant-Appellee	)	
	)	

BEFORE: Merritt and Rogers, Circuit Judges; and Hood,*
*District Judge

Danta Davis, a Michigan prisoner, was denied habeas corpus relief pursuant to 28 U.S.C. § 2254 in the Eastern District of Michigan. He appealed this decision raising four grounds for relief. This Court issued a Certificate of Appealability (COA) as to whether Davis was denied a fair trial and his right to present a defense where the trial court sustained the blanket assertion of the privilege against self-incrimination by a crucial defense witness.

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* The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

No. 03-2262
Davis v. Straub

The Court has concluded that a COA should be granted on two additional issues: (l) whether the prosecutor intimidated a crucial defense witness into invoking his privileges against self- incrimination in violation of defendant's rights to due process, compulsory process, and to present a defense, and (2) whether Davis was deprived of effective assistance of counsel where trial counsel failed to offer into evidence prior exculpatory statements of the crucial, unavailable defense witness after failing to object to the trial court's decision allowing the witness to make a blanket assertion of his Fifth Amendment rights, instead of invoking the privilege in response to specific questions.

Appellant shall file his brief on these issues by April 25, 2005. Appellee shall file his brief by May 23, 2005. Appellant shall file his response brief by June 12, 2005.

ENTERED BY ORDER OF THE COURT

/s/
Clerk